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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91217589
Party	Plaintiff Rhythm Holding Limited
Correspondence Address	JOHN L WELCH WOLF GREENFIELD & SACKS PC 600 ATLANTIC AVENUE BOSTON, MA 02210 UNITED STATES jlwtrademarks@wolfgreenfield.com
Submission	Opposition/Response to Motion
Filer's Name	John L. Welch
Filer's e-mail	jlwtrademarks@wolfgreenfield.com
Signature	/johnlwelch/
Date	03/07/2016
Attachments	91217589 Opposer's Reply to Applicants Opposition to Opposer's Motion to Compel Discovery.PDF(798652 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

_____)	
RHYTHM HOLDING LIMITED,)	
)	
Opposer,)	
)	
v.)	Opposition No.
)	91217589
J & N SALES, LLC,)	
)	
Applicant.)	
_____)	

OPPOSER’S REPLY TO APPLICANT’S OPPOSITION TO
OPPOSER’S MOTION TO COMPEL DISCOVERY

Opposer RHYTHM HOLDING LIMITED submits this memorandum in reply to Applicant’s Opposition to Opposer’s Motion to Compel Discovery.

I. Applicant J&N’s “Rash Incivility” Excuse and Its Disturbing Lack of Candor

Apparently desperate to justify Applicant J&N’s refusal to confer with Opposer Rhythm’s counsel by telephone regarding outstanding discovery issues, Applicant’s counsel has belatedly concocted the excuse that the undersigned counsel for Opposer was guilty of “rash incivility.” However, Applicant’s counsel made no mention of “rash incivility” when he wrote his email of January 19, 2016, calling off the scheduled telephone conference, nor when Opposer’s counsel continued to request a conference, nor at any time prior to its opposition paper.

Particularly disturbing is Applicant J&N’s inclusion of certain selected emails in its opposition papers – purportedly demonstrating the undersigned’s “rash incivility” –

while conveniently failing to provide the Board with several additional and highly relevant email messages that further refute that assertion.

For example, after Applicant J&N's counsel said in his January 19, 2016, email that "Unfortunately, I will not be available to join in a conference call with you this Thursday," the undersigned responded eight minutes later with this message:

"Thank you for your message.
"Please propose and (sic) a date and time for a conference call.
I am available any time (during business hours) from Wednesday-Friday of this week and all next week."

[Welch to Power email January 19, 2016 12:15 PM (Exhibit 13 hereto)].

Applicant's counsel did not even respond to that request for a new date for a telephone conference.

The chain of emails provided by Applicant's counsel also omits three emails falling between the email of Opposer's counsel suggesting a date and time of Thursday, Jan. 21 at 2pm for the telephone discussion, and the January 19 email from Applicant's counsel asserting his unavailability for the conference:

In response to Opposer's suggestion of a January 21st conference, Applicant's counsel responded:

"I realize that is what you would like, but I had some concerns myself. Did you notice?"

[Power to Welch email January 13, 2016 11:11 AM (Exhibit 14 hereto)].

Opposer's counsel responded as follows:

"Yes. We will discuss your concerns as well. I'm just trying to set a date and time for discussion of all the issues."

[Welch to Power email January 13, 2016 11:30 AM (Exhibit 14 hereto)].

Opposer's counsel followed up immediately with the following email:

"By the way, Mr. Power, your snide tone is not appreciated."

[Welch to Power email January 13, 2016 11:31 AM (Exhibit 15 hereto)].

Applicant's counsel obviously omitted those emails from its papers because they contradict his newly-minted "rash incivility" excuse for not conferring by telephone. In full context, the email exchange between counsel for the parties shows that there was no "incivility" at all – let alone "rash incivility" – on the part of Opposer's counsel. There was no name-calling, no personal attack, no rudeness. The real reason why Applicant's counsel refused to have a telephone discussion regarding the discovery issues is clear: Applicant did not want to resolve any discovery disputes because it prefers to delay this case by means of more unnecessary motion practice.

The Board can decide for itself whether Opposer's counsel was displaying "rash incivility" in characterizing Applicant's arguments as bogus,¹ "gibberish,"²

¹ The on-line *American Heritage Dictionary* defines "bogus" as "Counterfeit or fake; not genuine." That definition seems to fit Applicant's "rash incivility" excuse.

² The same dictionary defines "gibberish" as "Unintelligible or nonsensical talk or writing." This seems to perfectly describe Applicant's Interrogatory No. 7, which Applicant's counsel ultimately admitted was incomprehensible.

“nonsensical,” and “incomprehensible,” or whether in fact Opposer’s counsel was simply being accurate, if somewhat colorful in his language.

Applicant J&N’s lack of candor in failing to set out the full exchange between counsel is quite telling. Applicant is not interested in seeing the end of discovery in this case. Instead it will do all it can to obfuscate the issues and delay the ultimate resolution, perhaps in the hope that out of sheer exasperation Opposer will decide to settle the case.

Opposer Rhythm submits that Applicant’s failure to include these selected emails in its motion papers is a deliberate attempt to mislead the Board and should result in the imposition of sanctions against any further filing of discovery-related motions by Applicant.

II. Opposer’s Purported Lack of Good Faith

In another attempt to deflect the Board’s attention from its own failure to cooperate in discovery, and its own refusal to comply with the Board’s discovery rules, Applicant J&N complains that Opposer did not make a good faith effort to resolve the disputed issues because it did not respond to Applicant’s letters of January 25 and 27.

In fact, Opposer’s counsel did respond to the January 25th letter, in an email dated January 26th:

Dear Mr. Power:

We would like to discuss the issues raised in your letter by telephone.
Are you available tomorrow or Thursday?
As previously indicated, we plan to file a motion to compel, unless we can resolve these disputes by Friday.

[Welch to Power email January 26, 2016 9:02 AM (Exhibit 16 hereto)].

Once again, Applicant's counsel failed to respond to this request for a telephone conference.

Applicant J&N's letter of January 27th was a belated response to Opposer's letter of January 14, 2016. In the interim, Applicant's counsel had refused to discuss any of these discovery issues via telephone conference, and Opposer had indicated it would be filing a motion to compel. Rather than continue the futile approach of trying to resolve these issues by letter, Opposer decided to file its motion to compel, believing that the matters in dispute were sufficiently simple and well crystallized as to allow the Board to resolve them fairly quickly.³

Opposer Rhythm has repeatedly asked to confer with Applicant J&N's counsel in order to resolve, or at least narrow, the disputed discovery issues. But Applicant's counsel refuses to do so, preferring to file motions to compel in flagrant disregard of the Trademark Rules of Practice.

III. The Admission Requests in Dispute

There is no better evidence of Applicant's lack of cooperation in discovery than its responses to the disputed admission requests, and its subsequent attempts to justify its objections and refusals to respond substantively.

Category 1: "Absence of Factual Foundation"

Requests 3-14 ask for standard, straightforward admissions regarding the identification of goods in Opposer Rhythm's pleaded registrations. For example, Request

³ In fact, Opposer streamlined its motion to compel by dropping several items that had been included in its letters to Applicant.

No. 3 seeks an admission that “the goods identified in Registration No. 3,619,417 are not limited to any particular class of customers.” Applicant’s justification for its objections to these simple requests is disingenuous at best. According to applicant, these requests “cannot be answered because goods of the type listed may or may not be sold to particular classes of customers or in particular channels of trade, depending upon the circumstances under which those unidentified sale may have been made.” Obviously, Opposer’s admission requests are not asking about the goods actually sold, but simply about the wording of the identification of goods in the registration.

Similarly, Applicant’s argument regarding Requests Nos. 16 and 17 refuses to recognize that the request is directed to the language of Applicant’s identification of goods in the opposed application.

Requests 42-44 are again straightforward requests that are common to Section 2(d) likelihood of confusion proceedings. They merely seek admissions that the goods identified in the pleaded registrations and opposed application travel in the same channels of trade.

Requests 62, 64, and 66 contain standard language and (along with the accompanying interrogatory) properly seek to ferret out any facts that Applicant may possess that would support a denial of the validity of Opposer’s pleaded registrations. There is nothing vague or irrelevant about these requests.

Category 2: “Immaterial”

Although demanding discovery from Opposer as to Opposer’s channels of trade, and refusing to respond to admission requests regarding its own identification of goods, Applicant takes the position that Admission Requests 18-23 seek irrelevant information

because “this proceeding is limited in scope to applicant’s actual listing of goods, regardless of what is actually sold.” Once again, Applicant tries to have it both ways: it demands sweeping discovery from Opposer, but stonewalls when faced with the task of responding to Opposer’s discovery requests.

As to Admission Requests 37 and 38, Applicant claims not to understand the commonplace term “adopting” in the context of an admission request. Opposer is at a loss to respond to that assertion, since the term “adopting” is well understood in the context of trademark law.

As to Admission Requests 46-54, Applicant refuses to look at its own website and production documents to confirm the truth of these statements. Surely Applicant is aware of its own statements, but apparently Applicant’s counsel did not even bother to ask his own client.

Category 3: “Vague and Indefinite, Not Relevant, or Without Factual Foundation”

With regard to Admission Requests 33-36, Applicant again disingenuously refuses to look at the identification of goods in its own application and the goods in the cited registrations, preferring to pretend that the goods are “unspecified.”

As to Request 40, Applicant feigns to not understand the words “more prominently,” though they are common English words that are often used in the trademark context.

Requests 56-58 and 60 are relevant to show that the word “BLUE” in Applicant’s mark is actually descriptive of its goods, and therefore a weak formative at best. Certainly in that context the actual goods being sold by Applicant are relevant.

Request 59 and 60 again are couched in standard trademark terminology, and Applicant's objections are simply groundless.

IV. Opposer's Second Set of Interrogatories

Opposer's First Set of Interrogatories contained 18 numbered interrogatories. Applicant claims that they comprise 60 subparts, using a counting method that is both improper and also contradicted by Applicant's earlier position in this case regarding the number of subparts in its own interrogatories.

Even assuming *arguendo* that Applicant's count of 60 is correct, Opposer points out again that Applicant has actually denied, in whole or in part, only seven admission requests: Nos. 15 and 24-29. Thus Opposer's Second Set of Interrogatories requires only seven responses, not 63.

The coupling of Opposer's Second Set of Interrogatories is standard practice for TTAB practitioners, and experienced practitioners would know that.

V. Opposer's First Set of Document Requests

Applicant has not discussed these requests in its opposition, other than to claim that it is too late to bring up the issue of its inadequate responses. Contrary to Applicant's assertion, Opposer is not seeking "a specification of which documents applicant intends to use at trial." It is seeking full and complete responses to these requests, to which it is clearly entitled.

VI. Opposer's Second Set of Document Requests

Production Request No. 36, like Opposer's Second Set of Interrogatories, is coupled to its admission requests, as is standard procedure in trademark practice. It is not sufficient for Applicant to say that responsive documents "include public documents in the records of the Trademark Office." Opposer is entitled to know what documents support Applicant's denials or partial denials. A vague reference to unidentified documents at the USPTO is not a proper response.

Applicant's explanation regarding Production Requests 37 and 38 is likewise insufficient.

VII. CONCLUSION

For the foregoing reasons, Opposer Rhythm requests that the Board grant Opposer's Motion to Compel in its entirety, and that the Board issue an Order sanctioning Applicant for its misconduct in connection with its repeated failure to comply with the Trademark Rules, its refusal to provide proper responses to legitimate discovery requests, and its misleading characterization of the communications between counsel.

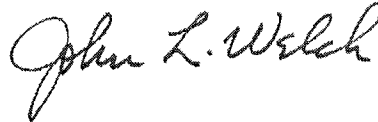
RHYTHM HOLDING LIMITED



John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
617-646-8000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Applicant this 7th day of March, 2016, by mailing a copy thereof via first-class mail, postage pre-paid, to James A. Power, Jr., Esq., Power Del Valle LLP, 233 West 72nd Street, New York, NY 10023.

A handwritten signature in cursive script that reads "John L. Welch". The signature is written in black ink and is positioned above a horizontal line.

John L. Welch

EXHIBIT 13

Welch, John L.

From: Welch, John L.
Sent: Tuesday, January 19, 2016 12:15 PM
To: 'James A.Power Jr'
Cc: Will Maguire (paliesq@gmail.com)
Subject: RE: Rhythm v. J&N Sales

Thank you for your message.

Please propose a date and time for a conference call.
 I am available any time (during business hours) from Wednesday-Friday of this week and all next week.

JLW

John L. Welch
 Counsel

jwelch@wolfgreenfield.com
 direct dial: 617.646.8285



Wolf, Greenfield & Sacks, P.C.
 600 Atlantic Avenue | Boston, MA 02210-2206
 617.646.8000 | 617.646.8646 fax

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From: James A.Power Jr [<mailto:jp@powerdel.com>]
Sent: Tuesday, January 19, 2016 12:08 PM
To: Welch, John L.
Subject: RE: Rhythm v. J&N Sales

Dear Mr. Welch:

Unfortunately, I will not be available to join in a conference call with you this Thursday, notwithstanding your kind remarks below. In the meantime, as promised, I will respond to your recent letter in writing this week, clarifying applicant's objections and seeking support for opposer's requests, in an effort to bring the two sides closer together. I would encourage your written reply to the same ends.

Thank you for seeing the error in my message below. Indeed, I was referring to *opposer's* 2014 discovery.

I find it difficult to understand how the Board's suspension of the filing of papers not germane to applicant's motions in any way hindered opposer's non-existent efforts over the past year to resolve between counsel any that might remain of its early disputes regarding applicant's objections. A reasonable assessment of this lack of resolve on the part of opposer is either that it had by now

abandoned its positions, just as it had so readily abandoned its initial interrogatory objections in response to applicant's first motion to compel, or that it had deemed the issues resolved.

Your advice that opposer has no plans to disclose, in response to long outstanding discovery requests and a more recent letter merely advising that your client may have overlooked some important categories and documents in its disclosures, may be yet another example of opposer's inability to cooperate in discovery until applicant moves to compel, whereupon opposer swiftly abandons its positions. If that is to be the case, you might advise your client to disclose those matters directly, as the Board has already recognized their ready availability (which is why I encouraged you to read applicant's motion now, rather than solely in opposing it again on procedural grounds), thus obviating the Board's consideration once again of what will become another of opposer's transient objections.

Thank you again for your letter, to which I look forward to responding shortly. We also look forward to your settlement proposal and substantive response to our January 7 letter.

Regards,

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

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EXHIBIT 14

14
Welch, John L.

From: Welch, John L.
Sent: Wednesday, January 13, 2016 11:30 AM
To: James A.Power Jr
Cc: Will Maguire
Subject: RE: Rhythm v. J&N Sales

Yes. We will discuss your concerns as well.
I'm just trying to set a date and time for the discussion of all the issues.
JLW

John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: James A.Power Jr [jp@powerdel.com]
Sent: Wednesday, January 13, 2016 11:11 AM
To: Welch, John L.
Subject: RE: Rhythm v. J&N Sales

I realize that is what you would like, but I had some concerns myself. Did you notice?

----- Original Message -----

From:
"John L. Welch" <John.Welch@WolfGreenfield.com>
To:
"James A.Power Jr" <jp@powerdel.com>
Cc:
"Will Maguire" <paliesq@gmail.com>
Sent:
Wed, 13 Jan 2016 16:02:22 +0000
Subject:
RE: Rhythm v. J&N Sales

You did not confirm a date and time.
Please advise.
My suggestion is Thursday, Jan. 21, at 2pm EST.
JLW

John L. Welch
Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue

Boston, MA 02210
direct: 617-646-8285

From: James A. Power Jr [jp@powerdel.com]
Sent: Wednesday, January 13, 2016 10:31 AM
To: Welch, John L.
Subject: RE: Rhythm v. J&N Sales

I received you emails. Relax. You are on vacation.

It has been over a year since applicant responded to opposer's initial discovery and, frankly, I don't see how you can allege a good faith effort to resolve any remaining issues at this late date, having ignored them for so long.

More importantly, I have never received a response from you to my several requests that we resume the settlement discussions had with Mr. Maguire.

While I understand that you would like to schedule a telephone call with me to discuss what we have most recently identified as opposer's remaining disclosure obligations (which we have diligently pursued and made progress albeit, from opposer, solely in response to our motions that, though avoided on dubious procedural grounds, resulted in advisory orders from the Board urging opposer's compliance), as well as applicant's objections, I think it would be worthwhile to address settlement then as well. What do you say? Please provide an agenda for our discussion or refer to previous correspondence outlining the same, if still current.

Hope you are some where warm and(/or) having a good time.

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

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----- Original Message -----

From:
"John L. Welch" <John.Welch@WolfGreenfield.com>

To:
"James A. Power Jr" <jp@powerdel.com>

Cc:

"Will Maguire" <paliesq@gmail.com>

Sent:

Wed, 13 Jan 2016 12:39:04 +0000

Subject:

RE: Rhythm v. J&N Sales

Third attempt.

Please let us have your response.

JLW

John L. Welch

Wolf, Greenfield & Sacks, PC.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

From: Welch, John L.

Sent: Tuesday, January 12, 2016 7:35 AM

To: James [A.Power](#) Jr

Cc: Will Maguire

Subject: RE: Rhythm v. J&N Sales

Re-sending.

May we please have a response?

Thank you.

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue

Boston, MA 02210

direct: 617-646-8285

From: Welch, John L.

Sent: Sunday, January 10, 2016 8:09 AM

To: James [A.Power](#) Jr

Cc: Will Maguire

Subject: RE: Rhythm v. J&N Sales

Dear Mr. Power.

I am on vacation until January 18th.

We would like to have a telephone discussion regarding your client's discovery responses, including not only its most recent responses, but all of them. I am available on Thursday afternoon, January 21st. Please let me know whether that date is convenient.

I note that you filed a motion to compel on Friday, January 8, again without making a good faith effort to resolve the disputed issues. Apparently you acted precipitously because you were under the mistaken impression that motions to compel have to be filed before the close of discovery. That is incorrect.

We will be prepared to discuss the issues involved in your motion in the same January 21st telephone discussion.

Given your client's position on opposer's discovery requests, please recognize the the purpose of the January 21st telephone conference is to satisfy the good faith requirement of the Trademark Rules preliminary to opposer's filing of any necessary motion to compel.

Very truly yours,

JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: James A. Power Jr [jp@powerdel.com]
Sent: Thursday, January 07, 2016 4:56 PM
To: Welch, John L.
Subject: Re: Rhythm v. J&N Sales

John:

I have read through your letter several times and will now try to respond the best I can.

Opposer is not entitled to answers to admission requests that are improper or objectionable. On the other hand, applicant denied a request in many cases at least in part to avoid an admission by default, as the rule suggests that requests not denied might be deemed admitted.

Hope this helps.

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com

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----- Original Message -----

From:

"John L. Welch" <John.Welch@WolfGreenfield.com>

To:

"jp@powerdel.com" <jp@powerdel.com>

Cc:

"Will Maguire (paliesq@gmail.com)" <paliesq@gmail.com>

Sent:

Fri, 4 Dec 2015 15:12:35 +0000

Subject:

Rhythm v. J&N Sales

Hello, Mr Power.

Please see the attached letter.

JLW

John L. Welch

Counsel

jwelch@wolfgreenfield.com

direct dial: 617.646.8285

Wolf, Greenfield & Sacks, P.C.

600 Atlantic Avenue | Boston, MA 02210-2206

617.646.8000 | 617.646.8646 fax

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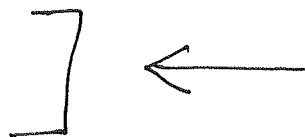
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EXHIBIT 15

Welch, John L.

From: Welch, John L.
Sent: Wednesday, January 13, 2016 11:31 AM
To: James A.Power Jr
Cc: Will Maguire
Subject: RE: Rhythm v. J&N Sales

[By the way, Mr. Power, your snide tone is not appreciated.



John L. Welch

Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

From: James A.Power Jr [jp@powerdel.com]
Sent: Wednesday, January 13, 2016 11:11 AM
To: Welch, John L.
Subject: RE: Rhythm v. J&N Sales

I realize that is what you would like, but I had some concerns myself. Did you notice?

----- Original Message -----

From:
"John L. Welch" <John.Welch@WolfGreenfield.com>

To:
"James A.Power Jr" <jp@powerdel.com>

Cc:
"Will Maguire" <paliesq@gmail.com>

Sent:
Wed, 13 Jan 2016 16:02:22 +0000

Subject:
RE: Rhythm v. J&N Sales

You did not confirm a date and time.
Please advise.
My suggestion is Thursday, Jan. 21, at 2pm EST.
JLW

John L. Welch

Wolf, Greenfield & Sacks, P.C.
600 Atlantic Avenue
Boston, MA 02210
direct: 617-646-8285

EXHIBIT 16

Welch, John L.

From: Welch, John L.
Sent: Tuesday, January 26, 2016 9:02 AM
To: 'James A.Power Jr'
Cc: Will Maguire (paliesq@gmail.com)
Subject: RE: Rhythm in Blues

Dear Mr. Power:

We would like to discuss the issues raised in your letter by telephone.

Are you available tomorrow or Thursday?

As previously indicated we plan to file a motion to compel, unless we can resolve these disputes by Friday.

Regards,

JLW

John L. Welch
Counsel

jwelch@wolfgreenfield.com
direct dial: 617.646.8285



Wolf, Greenfield & Sacks, P.C.
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617.646.8000 | 617.646.8646 fax

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From: James A.Power Jr [<mailto:jp@powerdel.com>]
Sent: Monday, January 25, 2016 6:03 PM
To: Welch, John L.
Cc: maguire@artnet.net
Subject: Rhythm in Blues

Please see attached letter.

James A. Power Jr
Power Del Valle LLP
233 West 72 Street
New York, New York 10023
212-877-0100
fax 212-580-0325
jp@powerdel.com
<http://www.powerdel.com>

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